**Medic One, Inc. *and* International Association of EMTs and Paramedics, NAGE–SEIU, AFL–CIO.** Cases 9–CA–36620–1 and 9–RC–17204

June 26, 2000

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On October 26, 1999, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Medic One, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(e).

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election in Case 9–RC–17204 shall be set aside and this case is remanded to the Regional Director of Region 9 to conduct a new election at a time and place determined by him.

[Direction of Second Election omitted from publication.]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's recommendation to set aside the election, we note that even absent Supervisor Neff's statement that he would "kick [employees'] asses" if they voted for the Union, the remaining 8(a)(1) violations would warrant setting aside the election.

In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule the *Excelsior* list objections. Further, no exceptions have been filed to the judge's dismissal of the 8(a)(3) allegations and his dismissal of the 8(a)(1) allegation involving Supervisor Neff's interrogation of employees.

[2] The judge inadvertently omitted certain required provisions from his Order. We correct these omissions here.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with loss of wages and benefits if they select the Union as their collective-bargaining representative.

WE WILL NOT inform our employees that regularly scheduled wage increases would be postponed until after the union campaign and election.

WE WILL NOT threaten our employees with physical harm if the Union were selected as the employees' collective-bargaining representative.

WE WILL NOT inform our employees that if they select the Union as their collective-bargaining representative they will be required to pay for damages arising out of accidents involving company vehicles.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MEDIC ONE, INC.

*Linda B. Finch, Esq.,* for the General Counsel.
*Timothy P. Reilly, Esq. (Taft, Stettinus & Hollister LLP),* of Cincinnati, Ohio, for the Respondent.
*Mark Pinkas*, National Vice President, International Association of EMTS and Paramedics, NAGE–SEIU, AFL–CIO, of Ventura, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR, Administrative Law Judge. These consolidated cases were heard before me in Cincinnati, Ohio, on May 17 and 18, 1999, pursuant to unfair labor practice charges filed originally on March 5, 1999, by the International Association of EMTs[1] and Paramedics, NAGE–SEIU, AFL–CIO (the Union) against Medic One, Inc. (the Respondent); these charges were amended on April 15, 1999, by the Union. On April 15, 1999, the Regional Director for Region 9 issued a complaint against the Respondent.

[1] EMTs are emergency medical technicians.

On February 1, 1999, the Union filed its petition for certification of representative with the National Labor Relations Board (the Board), and an election was held on March 12, 1999, pursuant to the provisions of a Stipulated Election Agreement approved by the Regional Director on February 10, 1999. On April 15, 1999, the Regional Director issued a report on objections to election,[2] order directing hearing, order consolidating cases, and order transferring cases to the Board.

The complaint[3] alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening its employees with loss of benefits and wages and physical harm, and by informing them that they would be required to pay the deductible amounts on insurance claims arising from accidents involving the Respondent's vehicles if they selected the Union as their collective-bargaining representative. The Respondent also allegedly violated Section 8(a)(1) by informing its employees that regularly scheduled wage increases would be postponed until after the union campaign (election). Lastly, the Respondent is charged with violating Section 8(a)(1) and (3) of the Act by suspending an employee because she supported the Union and engaged in concerted activities and/or because the Respondent believed that she engaged in these activities.

On or about April 22, 1999, the Respondent filed its answer essentially denying the commission of any unfair labor practices. The Respondent, however, admitted that the individuals described in paragraph 4 of the complaint, along with the respective position and title associated with each, were supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act. The Respondent denied having engaged in any objectionable conduct during the critical period governing the election.[4]

The parties were represented by counsel at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The parties were also afforded an opportunity to submit posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

## FINDINGS OF FACT

### I. JURISDICTION—THE BUSINESS OF THE RESPONDENT

The Respondent provides transportation by ambulance services for patients to and from medical facilities, such as hospitals, nursing homes, and doctors' offices. The Respondent's company headquarters is located in Cincinnati, Ohio, and provides ambulance services to the general public at several facilities located around the greater Cincinnati area.[5] The Respondent admits that in conducting its operations during the 12-month period ending April 1, 1999, it received gross revenues in excess of $500,000, and during that same period purchased and received at its Cincinnati, Ohio facilities, goods valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits, and I find, and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION

The Respondent admits, and I find and conclude, that the International Association of EMTs and Paramedics, NAGE–SEIU, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### *A. Background*

The Respondent operates as an ambulance transport company, basically transporting patients from one medical facility to another. The Respondent provides essentially three types of transportation services—advanced life support (ALS), basic life support (BLS), and wheelchair—bound patients. The Respondent began its operations on February 21, 1995, as a result of the merger of seven predecessor ambulance companies. The Respondent is headquartered in Cincinnati, Ohio, and was the subject of at least one prior organizational effort by the Union, sometime in 1997. The Respondent, while not unionized in Cincinnati, is unionized by a different union in Kalamazoo and is party to a collective-bargaining agreement.

The Respondent employs approximately 162 employees in an appropriate unit in the Cincinnati area.[6] The Respondent operates a fleet of 70 ambulances, which it maintains and repairs primarily at its Mitchell Avenue station. The Respondent employs approximately four mechanics (including a maintenance supervisor) to service its fleet. Employees are not required to maintain or service vehicles assigned to them and generally are not financially liable to the Respondent for damages arising from accidents occurring on company business. Employees, however, are charged with washing, cleaning, and

[2] The Union, having lost the election, filed objections to the election on March 18, 1999. On March 25 and 26 and April 14, 1999, the Union requested of the Regional Director permission to withdraw Objections 3, 4, 9, and 10, which request was granted. The remaining objections were numbered Objections 1, 2, 5, 6, 7, and 8 in the report which also included, as "other conduct" affecting the election, the Respondent's alleged unlawful suspension of employee Jennifer Wallace on February 25, 1999.

[3] The General Counsel moved, without opposition, to amend the complaint at the hearing as follows.

(1) Part 2(c) was added and reads, "At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act."

(2) The original part 2(c) was renumbered as part 3.

(3) Part 5(c) was amended to reflect that the allegedly unlawful conduct by the Respondent's maintenance supervisor, John Neff, took place at the Respondent's Mitchell Avenue, Cincinnati, Ohio facility as opposed to its Sycamore Township, Ohio facility. I granted the motion after determining that the Respondent did not object and there was no prejudice to the Respondent.

[4] The critical period as determined by the Regional Director is February 1, 1999, the date the petition was filed, through March 12, 1999, the election date.

[5] These facilities are located in nearby Sycamore Township, Afton, and Middletown, Ohio, and Mitchell Avenue (Cincinnati). In addition to its Cincinnati service area, the Respondent operates in Toledo, Ohio; Kalamazoo, Michigan; and Chattanooga, Knoxville, and Nashville, Tennessee. This case concerns only those facilities operated by the Respondent in the Cincinnati area.

[6] The appropriate unit set forth in the Stipulated Election Agreement is all emergency medical technicians, intermediate emergency medical technicians, paramedics, wheelchair care drivers, dispatchers and all talkers employed by the Respondent at its facilities located at Blue Ash Road, Sycamore Township, Ohio; 2694 Batavia—Williamsburg Pike, Afton, Ohio; 4700 Caprice Drive, Middletown, Ohio; and 4500 West Mitchell Avenue, Cincinnati, Ohio; but including all office clerical employees, couriers, guards, and supervisors as defined in the Act.

stocking their assigned vehicles. The Respondent is licensed and regulated by the Ohio Ambulance Licensing Board and is subject to its regulations and guidelines governing the operating practices of ambulances in the State of Ohio. Under the Respondent's operating guidelines, ambulance crews are responsible for not causing any unnecessary delays in the transport and completion of a transport of patients and specifically are directed to complete any transports they have embarked upon; transport crew exchanges are expressly forbidden. On May 28, 1998, the Respondent formally issued a notice of its transport policy essentially incorporating these guidelines and warning all employees that violations will result in disciplinary action up to and including termination.[7]

Beginning sometime in late December 1998, the Union began its organizing effort at the Respondent's Cincinnati area facilities. On March 12, 1999, an election was held. The Union lost this election 69 to 50 with 10 challenged ballots. The Union filed timely objections to the election, which were then consolidated with this unfair labor practice proceeding.

### *B. The 8(a)(1) Violations*

#### 1. The alleged threats of wage loss on February 23 and 24, 1999

The complaint in paragraph 5(a) alleges that the Respondent, through one of its station managers, violated Section 8(a)(1) of the Act by telling employees that they would lose wages and other benefits if they selected the Union as their collective-bargaining representative.[8] To establish this charge, the General Counsel called as witnesses Stanley Dale Lewis, a current employee, and Josey Nunn, a former employee.

Lewis testified that he was currently an EMT receiving $9.50 per hour assigned to the Afton station. According to Lewis, he was called in to meet with William "Bill" Shepherd on February 24, 1999, and had what he described as a private father-son type of discussion with him about the Union.[9] Shepherd related an experience that he had had with the Teamsters Union as a young man over 30 years ago where he was reprimanded by the Union for performing a service—changing a light bulb on a trailer—when that was not his job. Shepherd also told Lewis that the union campaign was actually part of plot, a conspiracy, by another company executive to get the Union in so that he could renegotiate company wages starting at "ground zero" with the hoped for result that wages could be reduced overall.[10] Shepherd then volunteered to Lewis that if the Union were elected, the employees would probably lose a couple of dollars per hour. According to Lewis, he told Shepherd that he did not believe that this would occur because he had discussed the union campaign and wage issues with his father-in-law who advised him that wages were subject to negotiation and that employees cannot be told they were going to lose money or make more money without negotiation. Therefore, Lewis told Shepherd that his claim of a loss of $2 if the Union were elected was not true as he understood matters involving union representation.

However, Lewis also noted that around 2 weeks before the election he saw a contract between a union (he believed to be the UAW) and the Respondent's Kalamazoo company covering EMTs and wheelchair drivers. Lewis observed the contract in the employees' break area on a picnic table at the Afton station. According to Lewis, he read the contract and determined that the Kalamazoo employees made less money than the Cincinnati employees although he could not remember the exact figures. Lewis had no knowledge as to who may have put the contract on the table, but the contract was a topic of conversation among the employees. Lewis did not discuss this contract with management, nor did he discuss his conversation with Shepherd with any of the other employees.

Josey Nunn, a former employee,[11] testified that on February 23, 1999, she received a page from Bill Shepherd's wife, Trudy,[12] who informed her that Bill Shepherd wanted to speak with her in his Afton office. According to Nunn, she and Shepherd—her immediate supervisor—conversed for about 30 minutes about the Union and some other nonunion issues. Shepherd told her he was "really concerned" about union issues at the Company, and they discussed a union contract Nunn had previously observed that day on the picnic table in the bay area of the station.[13] Shepherd specifically asked whether she had read the contract. Nunn responded that she had and, in fact, approved of some of its provisions. Thereupon, Shepherd, in a reproving tone, advised her that were the Union to come in, the employees could lose up to $2 per hour. According to Nunn, she had already made up her mind to support the Union. Also, Shepherd was known to "stretch a story 10 miles long," so she did not necessarily believe him. But, nonetheless, his statements made her stop and think about the possible loss of $2 per hour which she and a number of other employees with whom she discussed the matter thought was a lot of money.[14]

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[7] See R. Exh. 1.

[8] Objection 8 of the report on objections alleges, in essence, a similar charge stating that if the Union were voted in by the employees, their pay and other benefits would be adjusted to those set out in the Respondent's Kalamazoo collective-bargaining agreement with the United Auto Workers Union. In general, Objection 8 is substantially coextensive with part 5(a) of the complaint.

[9] Shepherd was the Respondent's crew manager at the Afton station; he is an admitted supervisor under the Act. The meeting occurred in the conference room at the Afton station; no one else was present.

[10] Lewis testified that Shepherd further explained to him that Onderlinde, the executive in question, also was instrumental in getting the Union in the Respondent's Michigan operation and actually had instigated the present union campaign. According to Lewis, Shepherd said that Onderlinde wanted a union at Cincinnati in part so that he could take over the general manager position held by James Sakel, with whom Onderlinde did not get along.

[11] Nunn, an advanced life support paramedic, was employed by one of the Respondent's predecessor companies for around 9 years and joined the Respondent at its inception in February 1995. Nunn voluntarily terminated her employment with the Respondent in April 1999 because of what she believed were several problems with the way the Company was operating. Her main complaint centered on the Company's splitting up of the paramedics because they were understaffed.

[12] Trudy Shepherd is the Respondent's head of scheduling. She did not testify at the hearing.

[13] According to Nunn, in their encounter, Shepherd raised alleged discriminatee Wallace's rumored involvement in the union organizing campaign and her possibly heading up the Union if it were elected. This matter will be discussed in a separate section of this decision. It is noteworthy to mention that Lewis and Shepherd also discussed Wallace in a conversation of February 24.

[14] Nunn specifically said (speaking of the loss of $2-per-hour):

> Well, like I said it played on my mind, I thought about it, I did. I thought you know—two dollars an hour is a lot, but I thought about it. A lot of us did, we all discussed it, we did. (Tr. 66.)

To rebut these charges, the Respondent called William Shepherd. Shepherd admitted that he had participated in "casual conversations" with both Lewis and Nunn about various topics, including matters touching on the Union—unionism in general[15] and the campaign specifically. Shepherd specifically denied making any statements about the possibility of the employees taking a $2 loss in wages were the Union to come in. Rather, according to Shepherd, he spoke to Lewis and Nunn as well as around six to seven other employees about a rumored $2 increase if the Union were elected. His intent was to dispel this rumor and advise the employees that any raises had to be negotiated.[16] As to the Kalamazoo contract on the picnic table, Shepherd stated that while only he and Mary Schaefer, the Afton station manager, have keys to his office where the contract was kept, he did not know how the contract found its way onto the picnic table where the employees congregate. Shepherd denied putting it there but admitted that he saw it on the picnic table. Shepherd conceded that the wages in the Kalamazoo contract were indeed lower than those paid by Medic One in the Cincinnati area (about $2.50–$3 less on average) and that some of the employees who evidently had seen it asked him what he knew about it. Shepherd told them that he only knew what he saw in the contract. According to Shepherd, he did not know how long the contract had been on the table, but he removed it when he saw it. Shepherd acknowledged that the contract should not have been on the table. Shepherd believed that he talked to Lewis about the rumored wage increase after he discovered the contract on the table; he later destroyed the contract.

As is often the case, the resolution of a charge redounds to determining what version of the facts and circumstances stated by the participants is the more credible. Regarding the conversation, which undoubtedly occurred between Lewis, Nunn, and Shepherd, I have decided to credit Lewis' and Nunn's version over Shepherd's. Notably, the Respondent in its brief argues to the contrary that Shepherd's testimony should be credited over that of Lewis and Nunn, suggesting that both Lewis and Nunn were strong union supporters. Moreover, the Respondent submits that Nunn was possibly disgruntled, having quit the Company because of problems with her working conditions. The Respondent argues, thusly, that Lewis and Nunn were biased against the Company. The Respondent submits that Shepherd's testimony about the rumor of a wage increase was corroborated by Paul Mascavage, an employee who claimed that he heard from another union adherent that there would be an increase were the Union to come in.[17]

First, I would point out that Lewis is a current employee of the Respondent. The Board has long held that the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995).[18]

Lewis, however, was otherwise credible in my view. He testified forthrightly and consistently, with no exaggeration. Moreover, his testimony was substantially corroborated, with the exception of the offending statements by Shepherd himself.

Nunn also impressed me as a witness and, in spite of leaving the Company for her stated reasons, she seemed to harbor no ill will toward the Company or Shepherd, who, likewise, did not speak disparagingly of her. I note that Nunn had been employed with the Respondent from its inception and apparently was in good stead with the Company. She was, in my view, forthright and honest and her testimony was corroborated both by Lewis and, to an extent, Shepherd. Shepherd, however, was not credible in material aspects of his testimony and, in fact, did not appear to me to be entirely truthful. For instance, his testimony regarding the mysterious appearance of the contract on the employees' picnic table did not ring true. Clearly, this contract was in his possession under lock and key, but Shepherd claimed not to know how he even acquired the contract. He could only assume that corporate headquarters mailed it to him. Shepherd "had no idea" what union was involved (in the contract), but he clearly knew that contract and wages were $2.50–$3 less than the Respondent's.[19] Shepherd also was less than forthright about his views regarding unions, claiming to have so-called mixed emotions about unions when clearly he had an abiding negative attitude about unions of over 30 years' standing. Shepherd's testimony that his prior experience with a union had nothing to do with the present union campaign struck me as particularly disingenuous. Accordingly, I would conclude that Shepherd made the statements attributed to him.

Discussion and Analysis

As noted by the General Counsel, it is well settled by the Board that in the context of a union campaign employers may violate Section 8(a)(1) by making direct or implied threats to reduce employee benefits. *Hamilton Plastic Products*, 309 NLRB 678 (1992); *Kenrich Petrochemical,s* 294 NLRB 519 (1989). However, statements comprising the alleged threats must be evaluated within the overall context in which the statements are made. *Bi–Lo Foods*, 303 NLRB 749 (1991).

The General Counsel contends that Shepherd's statements in context were intended to dissuade the Respondent's employees

[15] Shepherd admitted that he spoke with Lewis of his previous involvement with a union and his being rebuked by that union for doing work outside of his job classification, not being allowed to screw in a light bulb on a trailer. Shepherd claimed this was just "casual conversation" and denied telling Lewis that if the Union were elected things like that would happen, and denied being wary of the Union at Medic One.

[16] Shepherd claimed to have gotten word of this $2-per-hour increase from different employees he overheard talking among themselves around the station.

[17] Mascavage, an EMT–Basic assigned to the Mitchell station, testified at the hearing that many of the basic EMTs approached him, asking whether the wage increase rumor was true.

[18] See also *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. in relevant part 308 F. 2d 89 (5th Cir. 1962). It should be noted on this point that Lewis credibly testified that before the election the Respondent allowed him time in his work schedule to get to paramedic classes he was taking. After the election, management informed him that he would have to find a replacement on his class days as it could no longer guarantee that he could get off work in time to make his classes. Thus, the Board's concerns of pecuniary risk to a testifying employee are not merely conjectural or theoretical.

[19] I note that another current employee, Jane Lawrence, credibly testified that she saw the union contract on the picnic table at Afton on March 9 and Shepherd, in her presence and about six other employees, stated, among other things, that if the Union came in everything would be negotiable and employee wages would start at the bottom of the pay scale. Lawrence's testimony casts further doubt about Shepherd's claims of immediate removal of the contract on February 23 or 24 and that he was concerned solely about rumors of pay increases if the Union were voted in. (Tr. 190–191.)

from voting for the Union and were unlawfully coercive. The statements, she submits, were particularly coercive in view of Shepherd's concomitant actions of leaving the Kalamazoo contract with its lower wages out for the employees to view, his attempt to portray the union campaign as a conspiracy or plot by management to reduce their wages, and relating a personal negative experience with a union. In agreement with the General Counsel, I believe that under the totality of the circumstances, Shepherd's statements (and actions) combined to interfere impermissibly with the employees' freedom to select a representative of their choice. It should be noted that Lewis, by his own admission, was an active and open union supporter; Nunn, likewise, was by her testimony a union supporter. Therefore, in my view, it was not by mere coincidence or the result of so-called casual conversation that Shepherd sought them out in particular and attempted to persuade them (and perhaps other employees with whom Lewis and Nunn were likely to converse) to see the negatives associated with union representation and the futility of representation at the Company. That Nunn and Lewis did not necessarily believe him is not controlling as the Board's test for 8(a)(1) violations does not turn on the employers' motive or the success or failure of the attempted coercion. Rather, the test is bottomed on whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co*., 124 NLRB 146 (1959); *Roadway Express*, 250 NLRB 393 (1980). Accordingly, I conclude that the Respondent, by threatening its employees that they would lose wages if the union were voted in, violated Section 8(a)(1) of the Act.

2. The March 1, 1999, statement regarding postponement of wage increases

The complaint in part 5(b) alleges that on March 1, 1999, James Sakel, the Respondent's general manager (an admitted supervisor), informed employees that regularly scheduled wage increases would be postponed until after the union election campaign.[20]

It is undisputed that on March 1 Sakel convened a meeting of about 15–18 employees, including Nunn, in the bay area of the Afton station to discuss various business—related subjects and also to provide company—oriented information pertaining to the upcoming union election. At this meeting, Sakel reminded the employees that the Company had granted raises, instituted a 401 (retirement) plan, and upgraded the insurance plan since the last union campaign. It was in the context of Sakel's remarks about raises that Nunn spoke up and remarked that her partner, Joe Cluff—a paramedic—had applied numerous times for his raise and had not gotten any response from management. She then asked Sakel why the employees like Cluff were not getting the courtesy (respect) of a response from management regarding pay raises to which they felt they were entitled.[21] According to Nunn, Sakel said that he had not received Cluff's paperwork. At this point Cluff (who did not testify), according to Nunn, said that he had sent in his requests numerous times with no response from the Respondent. Sakel again responded that he had not received any requests and suggested that Cluff resubmit his paperwork. According to Nunn, Cluff filled out a wage form on the spot, handed it to Sakel, and then asked if he was going to get a raise. According to Nunn, Sakel responded that he was sorry, "but . . . right now I can't do anything because my hands are tied until this union issue is over with." (Tr. 51.)

Sakel admitted that at the meeting he discussed employee raises in general and a specific raise request from Cluff, but offered a different version of his conversation with Cluff. According to Sakel, when Cluff asked about an immediate raise and handed him the wage request form, he took the form but told Cluff there were more "parameters"[22] to the raise process and that Sakel could not simply at the time say that Cluff would or would not get a raise; that if he were entitled to a raise, he would get one. Sakel said that he further explained to Cluff that if he were entitled to a raise, he would get the raise no sooner than after the election because the following week was an off week and there would not be a paycheck.[23] Thus, if Cluff were entitled to a raise, he would receive it after the election.

The General Counsel (joined by the Charging Party) essentially contends that Sakel violated Section 8(a)(1) when he told the assembled employees that there would be no wage increases until after the union election because his statements impermissibly linked the awarding of the wage increase with the Union and its organizing effort. In this fashion, the General Counsel argues the Respondent attempted to coerce and interfere with the employees' Section 7 rights. The Respondent argues that Sakel's comments were statements of facts made in response to a question raised by an employee who confronted him in the middle of the meeting and, with a hastily filled out form, asked for an immediate raise. Sakel's response, so argues the Respondent, was simply his attempt to explain the payroll system and that any raise would of necessity be received on the next pay period, which would occur after the union election. The Respondent submits that the allegation in the complaint misrepresents the context of Sakel's comments and should be dismissed.

Discussion and Analysis

If the Respondent's version of the comments made by Sakel to the assembled employees were credited or creditable, then perhaps the statements present no offense to the Act. However, Nunn, whom I found to be a credible witness, provided what I

[20] This allegation corresponds to and is coextensive with Objection 5 of the report on objections.

[21] The Respondent requires its employees to make written application for any raises to which they may be entitled on wage request forms. The completed forms are given to the employees' station manager who then forwards them to the area manager and, ultimately, to Sakel. Wage increases are available to employees when they reach certain time in service points, e.g., at 3 months, 6 months, and 12 months. Employees are required to apply for raises at these intervals.

[22] Sakel explained that the wage increase parameters he was referring to included attendance, disciplines, the employee's current pay rate, and basic qualifications of the employee. Sakel, at the hearing, explained that these parameters were set out on the form. While the record is not entirely clear, Sakel evidently did not explain in detail what the parameters for raises were to Cluff and the assembled employees.

[23] Sakel explained "off week" to mean between pay periods. The Respondent pays on a biweekly basis, on Fridays. According to Sakel, the employees' next payday would have been Friday, March 5, and Cluff's pay raise, if he were due one, could not be processed in time to be received by that date. The next payday would have been March 17, a week after the election.

view as a vital context to the allegedly offending statement.[24] First, Sakel broached the issue of raises in his presentation to the employees, touting the Respondent's having granted wage increases without a union and thereby putting the Union in the mix. Second, an employee complained in response that the employees were not getting their raises, that paperwork was getting lost or simply not being processed. Third, and most importantly, Sakel then chose to deal with the employee's specific request for an increase by linking the request not only to the payroll process (parameters) but, also, to the union election. Clearly, to me, mentioning the union election was not necessary to explain why Cluff could not get a pay raise. Thus, it is reasonable that employees hearing him could conclude, as argued by the Charging Party, that raises were on hold because of the Union or that their pay in general could be adversely affected if the Union were voted in.[25] I conclude that by informing employees that wage increases that may be due them would be postponed until after the union election, the Respondent interfered with and coerced its employees in the exercise of rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1). *Laidlaw Waste Systems*, 307 NLRB 52 (1992).

3. The March 10 alleged threat of physical violence

The complaint in part 5(c) alleges, in essence, that Neff, the Respondent's head mechanic (and an admitted supervisor), threatened an employee with physical harm if the Union were voted in on March 10, 1999,[26] in violation of Section 8(a)(1).

The facts regarding the allegation are for the most part not in dispute. On or about March 10, Mike Parker, a paramedic assigned to the Sycamore station, accompanied by his partner, paramedic William Tomblin, brought his ambulance into the Mitchell station for an oil change and scheduled maintenance. It was here that Neff told the two men that, "if you guys vote for the union [he] would 'kick [their] asses.'" According to Parker (who testified at the hearing), he responded by asking why would Neff want to do that. Neff then said that he felt a union would not be good for the Company, it would hurt the employees and the Company. According to Parker, Neff repeated his threat to kick their asses if they voted the Union in and these threats were made within earshot of several other employees. Tomblin essentially corroborated Parker's version of this encounter, adding that Neff initially questioned them concerning their feelings about the Union before making the physical threats. Tomblin opined that Neff's threat seemed to be directed at Parker but that he (and Parker) took the threats seriously.[27]

Neff testified about the March 10 encounter with Parker and Tomblin and admitted saying the remark—"kick your asses"—attributed to him; however, Neff considered these remarks to be mere "joking,"[28] and that he, Parker, and Tomblin merely laughed over the remarks and, according to Neff, their remarks "had nothing to do with anything that was going on, we were just carrying on." (Tr. 306.) Neff admitted that he did not see Parker or Tomblin often on the job.

4. The March 12, 1999, statement by Neff regarding payment for damages to vehicles

The complaint in part 5(d) essentially alleges that on March 12, 1999, the Respondent informed employees that if the Union were voted in they would be required to pay the deductible amount on insurance claims arising from accidents involving company vehicles.[29]

Here, again, the alleged statements attributed to Neff were made to Parker and Tomblin. According to both men, Neff had come to the Sycamore station around 9 a.m. during the polling period on March 12 to check on a couple of vehicles which had been damaged in accidents some few days before.[30] Neff asked Parker which one was damaged and Parker pointed to some damage on the bumper of one of the ambulances. Then Neff said that was okay because if the Union is voted in the employees would have to pay for the damage to the ambulances. According to Parker, a number of employees were within 10–20 feet of the remark.[31] None of these employees made any response to the comment. Neff denied making the remarks in question and stated that he did not mention the Union in any conversations he may have had that day as it was election day and he was under specific instructions by his supervisors not to discuss the Union. However, Neff admitted that on a day he could not recall Parker had pointed out some damage to a vehicle, but Neff insisted that he made no comments about employees being required to pay for any damages if the Union came in. Neff allowed that he told Parker something he tells all employees—that they all need to be responsible for any damage to company vehicles—but he denied saying this to Parker on May 12.[32]

Discussion and Analysis of the March 10 and 12 Allegations

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[24] I note that Sakel was no novice to union electioneering and campaigns because of his experience with the Union's prior organizing effort as well as his having participated in the Company—sponsored classes for supervisors dealing with union electioneering—the do's and dont's of the process.

[25] I note that Jane Lawrence, another employee who attended the meeting, testified without contradiction that she heard Sakel's remarks. According to Lawrence, several employees asked about raises they were due to receive and Sakel said all wages were on hold until after the union vote. (Tr. 190.) Thus, in spite of what Sakel may have meant to say, it seems the employees heard something quite different.

[26] This allegation corresponds to and is substantially extensive with Objection 6, which alleges that the Employer created an atmosphere of coercion, intimidation, and fear during the critical period by threatening employees with physical violence if the Union was voted in.

[27] Both Parker and Tomblin knew Neff and regarded him as basically a nice guy who reputedly frequently joked with the employees. Neither Parker nor Tomblin had spent much time in Neff's presence during their time with the Company. Parker, however, had seen Neff lose his temper in spite of his general mild mannered disposition and demeanor.

[28] Neff admitted that when he made the remark, Parker and Tomblin looked at him "kind of strange" and then they too started laughing. Nunn told them he was kidding. According to Nunn, Parker and Tomblin then jokingly threatened him.

[29] This allegation corresponds to and is substantially extensive with Objection 7.

[30] Tomblin essentially corroborated Parker and differing only in respect to the number of other employees who were within earshot of the remarks. That is, he observed only two to four employees, some by the door and some in the back of the (ambulance) unit, and that he thought that Neff was only perhaps addressing Parker in terms of the previously discussed physical threats.

[31] According to Parker, the employees were Tomblin, Trudy Shepherd, several employees from the billing department, and three to four employees in uniforms (presumably paramedics or EMTs) there to vote.

[32] Neff seemed to be saying that, in his view, the employees should be responsible, meaning careful and accountable, in the operation of the ambulances.

The General Counsel contends that Neff's statements on the dates in question were violative of the Act. Specifically, the General Counsel argues that Neff's threats, irrespective of his "joking" intent, was unlawful nonetheless because a comment of this type could create an undercurrent of coercion in the minds of the employees. As to the March 12 statement, the General Counsel submits that Neff's comment about the employees paying for damage to their vehicles, something they were not required to do prior to the union campaign, constitutes an unlawful threat of loss of benefits and/or change in working conditions linked to the Union's campaign or being voted in. The General Counsel argues that Neff, as the maintenance supervisor, clearly was in the position of making such a recommendation to management and, therefore, his comments could be particularly coercive and, at the least, interfered with the employees' freedom to choose their representative.

With respect to Neff's physical threats, the Respondent argues that these were, in essence, harmless or innocuous. The Respondent points to numerous witnesses who testified that Neff was basically a nice guy, mild-mannered, amicable, and a great kidder, as well as the extreme difference in physique between Parker—6 feet 4 inches and around 300 pounds—and Neff—5 feet 9 inches and around 185 pounds—to discredit the charge that Neff was serious in his threat to physically harm them, as alleged by Parker and Tomblin. The Respondent also submits that Parker and Tomblin should not be credited over Neff who denied that he made any references to the Union on March 12 as he was so instructed by management.

Contrary to the Respondent, I found Parker and Tomblin highly credible witnesses. I note that at the time of the hearing both men were current employees and, to me, their testimony has a somewhat enhanced credibility. I note also that with regard to the physical threats, Neff himself admitted to making the remarks Parker and Tomblin attributed to him. He simply disagreed with intent of his utterance. Thus, with regard to the accuracy of Parker and Tomblin's testimony, nothing can be taken from them. Parker and Tomblin's testimony regarding the payment by employees for damages to company vehicles has the ring of truth to it, since even Neff admits that he had openly made comments to the employees about assuming responsibility for their actions, presumably their accidents with company ambulances. As to Neff, I was not altogether impressed with his testimony regarding these charges, although he certainly was not totally incredible. To his credit, Neff admitted he made the physical threat remarks. However, in significant aspects, Neff's testimony was less than forthright, hesitant, somewhat evasive, and clearly overly protective of management. To me, he obviously tried to minimize his remarks in a self-serving way. On balance, I believe Parker and Tomblin's version of their encounter with Neff and especially the remarks attributed to him by them.

As to the physical threat remarks by Neff, superficially, they seem harmless and perhaps because of the disparity in physiques between Neff, Parker, and Tomblin,[33] the threat potential seems somewhat ludicrous. However, in my view, Neff's ability to carry out his threat is not controlling, and Parker and Tomblin's reactions are not controlling. The question is whether in context, Neff's conduct posed an impermissible coercive effect on the employees who, within about 2 days of the physical threats, were about to exercise their rights to choose a representative. I first note that, while not charged in the complaint, Neff, according to Parker, also approached him during the organizing campaign and in casual conversation said, "So you started the union, you bad boy you." This prompted Parker to ask Neff where he got that idea of his involvement and who told him. Neff told Parker that no one had told him but went on to say that we (the Respondent) had several names they suspected were union instigators and provided the names.[34] Clearly, Neff's comments could cause employees to feel that their activities were being surveilled by management and could promote a coercive atmosphere in the critical period. Then too, another EMT employee, Mascavage, testified that Neff asked him how he felt about the Union, "if we were for or against it."[35] Neff, by his own testimony, was instructed not to discuss the Union by the Respondent's management not only on election day but also as much as a month before the election, and he also surely attended the electioneering classes management convened for supervisors and, therefore, presumably was apprised of the need to preserve the laboratory conditions of the campaign and the election process. Yet, in seeming defiance of instruction, good sense, and propriety, Neff did just the opposite. In my mind, he did so with the intent to influence the employees. I note that in spite of Neff's protestations of indifference to the Union the record clearly shows his antipathy for the Union, as evidenced by not only the comments he made but also his violation of management's instructions not to discuss the Union during the critical time frame.

Neff was a supervisor who occupied a significant and vital position with the Respondent. He repaired and maintained the vehicles on which the employees depended for their livelihood. Neff was respected and well liked by the employees. Therefore, his views were capable of persuading and influencing the employees. Thus, I agree with the General Counsel (and Charging Party) that Neff's physical threats underscored his union animus and, while he could not (and probably would not) carry out his threat, in context, his threats were calculated to coerce and reasonably could be said to have the tendency to interfere with the employees' free exercise of their Section 7 rights; *International Door*, 303 NLRB 582 (1991); *Great Dane Trailers*, 293 NLRB 384 (1989). In likewise, Neff's statements that employees would be required to pay for damages to the Respondent's vehicles involved in accidents, in my view, were either a threat of a loss of a benefit and/or a threatened change in working conditions calculated by Neff to coerce the employ-

[33] It should be noted that Tomblin also was a good-sized man, considerably larger than Neff, though not as big as Parker. Clearly, there was a physical mismatch between Neff and these two men, leading me to conclude that neither Parker nor Tomblin were in reasonable fear for their personal safety. However, this is not controlling, as explained above.

[34] Neff identified several persons. It is interesting to note here that alleged discriminatee Wallace was not mentioned as one of these union organizing suspects.

[35] Mascavage further testified that Neff's expressed opinions about the Union vacillated depending on the response of the person questioned. If an employee was for the Union, Neff was for it; if the employee were against, then Neff was against the Union. It is noteworthy that Mascavage identified an employee, John Hotarick, as an adamant union supporter, and Neff identified Hotarick as a suspected union supporter. Although the Respondent was not charged, the General Counsel seeks a finding of a violation of the Act by dint of Neff's interrogations. This issue will be dealt with in a separate section of this decision.

ees and reasonably could have that intended effect. *Hartman Mechanical, Inc*., 316 NLRB 395 (1995);[36] *Milford Plains*, 309 NLRB 942 (1992). I would conclude that by threatening to physically harm employees and requiring them to pay for damage to company vehicles if the employees selected the Union as their collective-bargaining representative, the Respondent coerced and interfered with the employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

### *C. The Union's Objections to the Election: The Excelsior List Objections*

On a petition filed on February 10, 1999, and pursuant to a stipulation for certification on consent election executed by the parties and approved by the Regional Director for Region 9, an election by secret ballot was conducted on March 12, 1999, among the employees in an appropriate unit. At the conclusion of the election, the tally of ballots showed that of approximately 162 eligible voters, 119 ballots cast—50 were for the Union, 69 were against, and 10 ballots were challenged. The challenges were insufficient to affect the election's results.

#### 1. Discussion of Objection 1

The Union's Objection 1 alleged that the Respondent interfered with the election and improperly affected the results of the election by failing to provide an accurate list of the employee names and addresses. The Union's Objection 2 alleges that the Respondent interfered with and improperly affected the results of the election by omitting eligible names from the *Excelsior* list. In support of these objections, one witness, Marc Pinkas, testified on behalf of the Union. The Respondent presented its director of human resources, Anthony Stagge, as its sole witness.

The Union contends that of the 162 addresses provided by the Respondent, a total of 21 were incorrect and, in addition, the Respondent omitted the names of two other employees. At the hearing, the Union introduced copies of only 19 envelopes returned by the Post Office for address corrections (C.P. Exhs. 2 and 3), noting that the addresses on the returned envelopes were taken from the list supplied by the Respondent. The 19 returned envelopes are part of 21 incorrect addresses in contention.[37]

According to the Employer's director of human resources, Anthony E. Stagge, the *Excelsior* list that was submitted to the NLRB in connection with the election conducted on March 12, 1999, was compiled from a computer database at the Respondent's Cincinnati headquarters. Stagge testified that these are the same addresses used by the Respondent during the campaign and by its human resources department pursuant to its normal business operations. (R. Exh. 3.)

According to Stagge, the Respondent received a fax transmission from the Union on March 8, 1999, requesting an accurate list of eligible employees, including the employees whose mail was returned. Based on the Respondent's own returned mailings prior to receiving the March 10, 1999 fax from the Union, the Respondent knew that the *Excelsior* list contained some incorrect addresses. On March 10, 1999, the Respondent hand-delivered to the Union an updated listing of the employees' addresses. (R. Exh. 5.)

On March 10, 1999, the Union sent another fax to the Respondent the next morning listing two additional employees whose mail had been returned due to inaccurate addresses. (R. Exh. 6.) On March 11, 1999, the Respondent faxed to the Union updated addresses for the two employees. Stagge admitted that throughout this period the Respondent, at its own initiative, did not attempt to rectify the situation by providing corrected addresses to the Board.

#### Discussion

By execution of the stipulation for consent agreement, the Respondent agreed to be bound by the Board requirement that the employee list be forwarded within 7 days of approval of the agreement. *Bishop-Hansel Ford Sales, Inc.*, 180 NLRB 987 (1970); *Rockwell Mfg. Co*., 201 NLRB 358 (1973). Within 7 days after the Regional Director has approved a consent election agreement, an employer must file with the Regional Director an "*Excelsior* list"—an election eligibility list containing the names and addresses of all eligible voters. The Regional Director must then make this information available to all parties. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966).

The Respondent, at the hearing, attempted to show that some of the names contained in the Union's March 8, 1999, fax listing employees who had their mail returned were no longer in the Employer's employment as of the payroll eligibility date, January 30, 1999. In particular, the Respondent maintained that of the 17 named employees, at least 3—John Roland, Darlene Thompson, and Christopher Shepherd—were not eligible voters at the time of the payroll eligibility date. Therefore, the Respondent contends that the incorrect addresses given to the Union in the final *Excelsior* list (R. Exh 3) could not affect the election. Assuming, arguendo, that the three were ineligible, there remain, nonetheless, 14 other employees (or approximately 8.6 percent of the total) whose addresses were inaccurate. Therefore, whether and to what extent these inaccurate addresses may be said to have legal consequence must be considered.

First, under *Excelsior*, supra, an employer's failure to furnish a voter eligibility list in a substantially correct manner is grounds for setting aside an election if proper objections are filed. In determining whether an election should be set aside based on an employer's failure to satisfy the requirements of the *Excelsior* rule, the Board does not apply the rule on a mechanical or per se basis. *Telonic Industries,* 173 NLRB 588 (1968). Instead, the basic test is one of "substantial compliance." *Program Aids Co*., 163 NLRB, 145 (1967). Significantly, a minor deviation from the rule does not necessarily require setting aside the election. *Telonic Industries,* supra.

Moreover, the Board evidently views mere inaccuracies in names and addresses of eligible voters as a less serious matter than the total omission of names and addresses, and this distinc-

[36] The Respondent, in its brief at p. 18, alluding to the allegation in part 5(d) that the offending statement related to the requirement of employees to pay their deductible amount on insurance claims and the General Counsel's proof that employees would be required to pay for damages to the vehicles, argues that the General Counsel did not prove this charge. I would find that there was a variance between the charge and the proof. However, I would conclude that the variance was de minimus, as there is little or no substantive difference in the charge and the proof adduced. *Vulcan Hart Corp.*, 248 NLRB 1197 (1980). Moreover, the Respondent has not asserted any prejudice attributable to the variance, and the Respondent has fully taken advantage of the opportunity to defend against the charge. Accordingly, I would conclude that any variance regarding this part of the complaint is not fatal, and the General Counsel has met her burden. *Custom Window Extrusions*, 314 NLRB 850 (1994).

[37] It is noteworthy that the Union received some of the returned envelopes as early as March 1, 1999.

tion is given effect in determining where the employer had substantially complied with the *Excelsior* rule. *Thrifty Auto Parts,* 295 NLRB 1118 (1989). Notably, the NLRB has indicated that elections should not be set aside because of inaccuracies as long as the employer was not grossly negligent and acted in good faith in supplying the required information. *Texas Christian University*, 220 NLRB 396 (1975).[38]

Most recently in *Mod Interiors, Inc*., 324 NLRB 164 (1997), the Board ordered a new election in the absence of bad faith, where the original *Excelsior* list contained a significant number of 40 percent inaccurate addresses; a corrected list was only available to the union 8 days before the election; and the election was decided by a close margin. In *Mod Interiors*, the Board seemingly gave less credence to the employer's good-faith attempt to provide an accurate list. Rather, the Board noted that, "The *Excelsior* rule is not intended to test employer good faith or 'level the playing field' between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights" (id. at 164). Clearly, to the Board, the high percentage of inaccurate addresses overrode the employer's claim of good-faith compliance with the rule.

However, based on my research, the Board has yet to find that an address inaccuracy rate below 40 percent constituted insubstantial compliance. For instance, in *Lobster House*, 186 NLRB 148 (1970), inaccuracies on the *Excelsior* list were found to be of an insubstantial nature to affect the results of the election, when 20 out of 97 addresses were erroneous (a 16-percent error rate). Similarly, in *West Coast Meat Packing Co*., 195 NLRB 37 (1972), where 22 percent of addresses on the *Excelsior* list was deemed inaccurate, the inaccuracies were not found to be substantial enough to require setting aside the election. In that case, the addresses had been drawn from the W-4 forms completed by employees. In *Days Inns of America*, 216 NLRB 384 (1975), 13.2 percent of voter addresses were incorrect, those addresses also having been drawn from employee personnel forms. In *Fountainebleau Hotel Corp.*, 181 NLRB 1134 (1970), the Board found substantial compliance with the *Excelsior* requirement despite inaccuracies on the list which involved 18 percent of eligible voters. In *Women in Crisis Counseling*, 312 NLRB 589 (1993), there was a 30-percent inaccuracy rate, and the Board ruled that the employer had substantially complied with the requirements of the *Excelsior* rule by providing the full names and addresses of all the eligible voters it had on file.

It should be noted that in all these cases, there was no showing of bad faith or gross negligence, and the errors involved inaccuracies and not the omission of eligible voters from the list. Notable also in some of these cases, the vote was close enough to have been possibly affected by the number of errors on the list. For instance, in *Lobster House*, the vote was 27 yes and 41 no; in *West Coat*, the vote was 17 yes and 19 no; in *Fountainebleau*, the vote was 125 yes and 138 no.

In *Bear Truss, Inc*., 325 NLRB 1162 (1998), decided after *Mod Interiors*, supra, the error rate was 14 percent and the election was close. Nonetheless, the Board held that *Mod Interiors* did not establish a bright line rule automatically overturning the results of an election where the number of inaccuracies on the *Excelsior* list exceeded the margin of the vote. *Bear Truss*, supra. Furthermore, the Board maintained that *Mod* did not specifically overrule previous case law where inaccuracies in the *Excelsior* list are involved. The Board reasoned that although at first blush such a rule would seem to be reasonable, it would require that if there was one inaccurate address and the election was decided by one vote, that the election be set aside, even if the inaccuracy rate was only 1 percent or less.

Thus, it would seem that the Board applies the substantial compliance rule on a case-by-case basis and not by simply employing mathematical percentages to arrive at a determination of whether an election should stand or be set aside because of inaccuracies in the list provided by an employer.

As to the instant case, if one assumes that the Union was given 21 inaccurate addresses, then the percentage of error is approximately 12.96 percent; 19 inaccurate addresses produces an 11.72-percent error rate; and 14 inaccurate addresses equal approximately 8.6 percent. Furthermore, it is undisputed that the corrected list was received by the Union only 2 days prior to the election, and the inaccuracies as alleged in the *Excelsior* list were greater than the 19-vote difference for the Respondent and against the Union.

Thus, under the extant circumstances, this election could be described as close and the information not received by the possibly 21 employees may have impeded a free and informed choice among the electorate. As the Board has suggested, it would be anomalous indeed for the Board to certify results of elections conducted without compliance with the *Excelsior* rule because such elections do not ensure that employees are fully informed about the arguments concerning representation and thus are not able to exercise fully their Section 7 rights. *North Macon Health Care Facility*, supra. Nevertheless, to date, the Board has been unwilling to find in the absence of bad faith that below a 40-percent inaccuracy rate in the addresses constituted insubstantial compliance, even when the vote was close enough to have been possibly affected by the number of errors on the list. Furthermore, in the case at hand, there seems to be no evidence that the Employer acted with bad faith or gross negligence.

The Board has stated that when an employer is presented with a report that numerous employees had failed to receive its mailings, the employer is obligated to use its best efforts to furnish corrected addresses, especially if the employer had a policy that employees were required to report address changes. *Laidlaw Medical Transportation*, 326 NLRB 925 (1998).

On this record, the Respondent had knowledge that its *Excelsior* list contained some incorrect addresses and did not attempt on its own to rectify the situation by providing a corrected list to the NLRB. However, the Respondent also relied on the same list during the campaign and, therefore, gained no advantage by failing to correct the inaccuracies. There was no evidence offered to show that the Employer routinely sent mail to its employees, which would put the Respondent on notice of a need to correct its records. Further, there is nothing of record to show that the Employer did not provide the most accurate addresses for its own records. On balance, thus, it does not seem that there is sufficient evidence to establish that the Re-

[38] The Board has noted that a finding of bad faith is not a precondition for the conclusion that an employer has failed to comply substantially with the rule. *North Macon Health Care Facility*, 315 NLRB 359 (1994). Furthermore, the Board has stated that it has long recognized that the rule is prophylactic, so that "[e]vidence of bad faith and actual prejudice is unnecessary because . . . the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply." *Thrifty Auto Parts*, supra.

spondent acted with bad faith or, at a minimum, with gross negligence. Ultimately, the Respondent did make some attempts to comply with the requirements of the *Excelsior* rule. Because it has not been sufficiently demonstrated that the Respondent failed to substantially comply with the *Excelsior* rule regarding the claimed inaccuracies in the lease, I would conclude that the Union's Objection 1 should not be sustained.

2. Discussion of Objection 2

The Board views the omission of names and addresses of eligible voters from the *Excelsior* list as a much more serious matter than mere inaccuracies regarding names and addresses. In this regard, the Board presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election without inquiry into the question of whether the union may have obtained some additional names and addresses of eligible employees or whether omitted employees might have garnered sufficient information about the issues to make an intelligent choice. *Thrifty Auto Parts*supra. The Board has stated that an employer, by omitting a substantial number of voters' names from the *Excelsior* list, can defeat the very purpose of the *Excelsior* rule: "to further the fair and free choice of bargaining representatives . . . by encouraging an informed employee electorate and by allowing unions the right to access to employees that management already possesses." *EDM of Texaco*, 245 NLRB 934, 940 (1979) (quoting NLRB v. *Wyman-Gordon Co*., 394 U.S. 759 (1969)).

In the case of omissions from the *Excelsior* list, the Board presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election. Thus, the question of whether the omissions were the result of bad faith or mere inadvertence does not influence the calculation of whether compliance has been substantial or not. Evidence of bad faith is unnecessary in these situations because the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious compliance. *Thrifty Auto Parts*, supra.[39]

Notably, the Board in *Shore Health Care*, 323 NLRB 990 (1997), while reiterating that evidence of bad faith or gross negligence is not required in order to find objectionable an employer's failure to comply with the *Excelsior* requirements, nevertheless, also took bad faith in to account, concluding that the omission of 5 percent of eligible voters from the *Excelsior* list was sufficient to set an election aside where the employer had acted in bad faith. In addition, the Board maintained that in circumstances where the omission of names from the list is the result of conduct demonstrating bad faith or gross negligence on the part of an employer, such conduct is a relevant consideration in determining whether the employer has failed to comply with the *Excelsior* rule.

In the instant case, the Union alleges that the Respondent erroneously omitted the names of 2 out of a total of 162, or less than 2 percent, of the eligible voters' names from the eligibility list. Union Representative Marc Pinkas testified that it was the Union's contention that there were some names incorrectly omitted from the *Excelsior* list. However, Pinkas also testified that he was unable to recall without his notes the names of these employees and stated nothing more concerning the matter. There was no further evidence submitted by the Union in support of Objection 2.

Thus, based on the credible evidence, first, I am not persuaded that the Respondent actually omitted two names from the list and, on this ground alone, I would not sustain Objection 2. However, even assuming, arguendo, that the Respondent may have omitted the two employees, they represent less than 2 percent of the eligible voters, which, in my view, is a de minimus omission. Thus, in my view, these possible omissions would not be enough to affect the results of the election. I recommend that Objection 2 not be sustained.

*D. The 8(a)(3) Allegation*

The complaint in part 6 alleges, in essence, that on about February 25, 1999, the Respondent suspended employee Jennifer Wallace because she supported the Union and engaged in concerted activities on its behalf, and/or because the Respondent believed that she supported the Union and engaged in activities on the Union's behalf—all in violation of Section 8(a)(3) and (1) of the Act.[40]

1. The December 19, 1998 incident

It is undisputed that Wallace's suspension was based on events occurring on Saturday, December 19, 1998, while Wallace was on duty but near the end of her assigned tour of duty. On that day, Wallace, an EMT working for the Respondent since December 1997 out of the Afton station, and her assigned partner, Roger Carl, were scheduled to make a "baby run"[41] near the end of their shift from Cincinnati's Children's Hospital to Dayton Children's Hospital. However, Wallace received a call from her grandparents about a half-hour before her shift's end and was advised that Wallace's brothers needed to be picked up from a local video arcade after she finished her normal shift. Wallace then requested a crew exchange of Phillip Hauke,[42] the Respondent's dispatcher, so that she could pick up her brothers. Wallace advised Hauke that the unit they were then assigned, No. 570, was not equipped to handle a baby run. After some discussion, the dispatcher ordered Wallace and Carl to the Mitchell station to pick up a vehicle equipped for baby transport—No. 580. Wallace and Carl then proceeded to Cincinnati Children's Hospital. However, on arrival, they were told that the baby medical team was not available but was en route to the hospital; the Respondent's dispatcher was informed of this. Wallace then asked the dispatcher if there were a crew coming on duty. She was advised that one was scheduled for 6 p.m. Carl contacted the dispatcher and asked whether the oncoming crew could come to the hospital to relieve him and Wallace, since the baby medical team was late and it was approaching their normal quitting time. According to Carl, one of the dispatchers approved this request. Meanwhile, one of the

[39] In *Thrifty Auto Parts*, omissions of 9.5 percent of eligible voters' names from the eligibility list resulted in setting aside the election in the absence of bad faith. A similar result was reached in *Gamble Robinson Co.*, 180 NLRB 532 (1970), where 10 percent of eligible voters were inadvertently left off the list.

[40] This charge mirrors allegations in the report on objections captioned there as "Other Conduct."

[41] A baby run requires that the infant/child be transported in an ambulance specially equipped for their care needs, including oxygen calibrated for infants (baby air), and an incubator type device called an isolette. There is in addition to the EMT team, a team of medical persons, e.g., doctors and nurses who accompany and tend to the child from beginning to end of the transport. The EMTs render no medical assistance to the child and generally act as drivers only.

[42] Hauke did not testify at the hearing. However, I have credited Roger Carl, Wallace's partner on that day, who explained his contact with dispatcher Hauke and the other dispatchers who were named.

baby team members had shown up and the other was still en route. Around 6–6:15 p.m., the other medical team member showed up and the dispatcher advised Carl that one member of the oncoming ambulance crew—Charlotte Wells—had clocked in and that as soon as her partner, Mike Hamlin, arrived, the crew would be sent to the hospital to relieve Carl and Wallace.

Meanwhile, Wallace explained to the medical team member that the run was going to keep her on duty past her quitting time but that there would be another ambulance crew relieving them. The team members told Wallace and Carl that the child in Dayton was stable and was only being transported to Cincinnati for an evaluation. Carl and Wallace then recontacted the dispatcher and were advised that the oncoming crew was being dispatched to the hospital. According to Carl, the now-assembled baby team, once told this, asked if the oncoming crew was anywhere near the routes they would take to Dayton and, if so, suggested that the crew exchange be made en route. Wallace and Carl contacted the dispatcher about the whereabouts of the oncoming crew and were advised that the crew was just past a BP gasoline station en route to Cincinnati Children's Hospital. Carl asked the dispatcher to advise the oncoming crew to go back to the gas station and await their arrival for the exchange; the dispatcher, according to Carl, approved this request. Wallace, Carl, and the baby medical team proceeded to the BP station.

However, as Carl and Wallace were approaching the gas station, the dispatcher paged them and told them that the anticipated crew exchange violated company policy and if they completed the exchange they would be subject to disciplinary action. With this, Wallace was unsure about completing the exchange. However, since she reasoned that she was only a quarter a of mile from their rendezvous, she decided to meet the other crew there and see what the others wanted to do.

Upon Wallace and Carl's arrival at the BP station, in spite of the warning, the crew exchange was completed. The medical team was taken to Dayton by the oncoming crew, Wells and Hamlin, to pick up the child.[43]

2. The aftermath of the December 19 crew exchange

After the crew exchange, Wallace and Carl proceeded to the Sycamore station to drop off Carl. While there, Wallace and Hauke argued with each other, with Hauke claiming that he had not approved the exchange. Then Hauke advised that Sakel was on the telephone and wanted to speak to her. Sakel instructed Wallace to give him a written report by the next Monday morning. Wallace then proceeded to the Afton station and decided she needed to speak to Sakel. She asked the dispatcher there to have Sakel call her. Sakel returned her call and in that conversation Wallace and he discussed the incident more at length. Wallace questioned the violation because the policy in question related to crew exchanges with patients on board, which was not the case in her situation; Wallace also argued that the baby team nurse approved the exchange, as well as Hauke. Sakel was not persuaded by her argument and advised her that more than likely, she would be suspended. Sakel scheduled a followup meeting with her for the following week. Wallace, having given a copy of her written statement[44] to Kenneth Crank, her night shift commander, on Tuesday, December 23, met with Sakel, Crank, and Gregory Garrison, the ALS supervisor, during Christmas week. Sakel explained to Wallace that they were meeting to deal with the December 19 incident. After some discussion, Sakel advised Wallace that she was going to be suspended for violation of the Company's transport policy but that her suspension would not take effect until after the holidays. For her part, Wallace did not agree with Sakel's assessment of the violation, mainly because she felt that the exchange was approved and there was no patient on board at that time.

Wallace received her suspension notice on February 25, 1999,[45] from Garrison and William Shepherd, as witnesses at the Afton station. None of the other employees directly involved in the crew exchange received any discipline.[46]

The General Counsel (and Charging Party) contends that Wallace was unlawfully suspended primarily because of the suspected involvement of her and her boyfriend, Michael Morrison, in the union organizing campaign.[47] The General Counsel

[43] The circumstances surrounding the decision to complete the crew exchange are not entirely clear. Wallace and Carl said they received the page from the dispatcher about the possible violation of company policy before the actual exchange. Charlotte Wells testified that she did not receive the policy violation page until after the exchange and did not recall her partner saying at the BP station, "it's their ass now, Phil Hauke has approved the crew exchange," as asserted by Wallace. Hamlin did not testify. Carl could only recall that Wallace, on a special radio channel with the Wells crew before the exchange, in effect said we are already in trouble and might as well do the exchange. On balance, I would credit Wallace and Carl on this point and conclude that all parties involved in the exchange were advised prior to the exchange that they were violating company policy and faced disciplinary action.

[44] Wallace's written report is contained in G.C Exh. 3.

[45] Wallace's disciplinary notice, contained in G.C. Exh. 4, is dated February 9, 1999, and states that Wallace violated company policy regarding a midtransport crew exchange on December 19, 1998. Wallace was suspended for a minimum of four shifts without pay, to be set by the Company. Ultimately, Wallace was suspended on March 3, 4, 10, and 11—a total of 40 hours.

[46] Wells was doubtful about what discipline she might have received, claiming that she was talked to and informed by persons whose names she could not recall that the incident was on her record; she also was asked to write up the incident by the dispatcher; but she did not ever do this. Wells also said Hamlin was asked to write a report but does not know whether he did. Carl also talked to Sakel who directed him to write a report, which he did. Carl also met with Sakel on the Monday after the incident and discussed it. According to Carl, Sakel basically felt that Wallace was mainly at fault and promised to investigate the matter; Sakel never disciplined him. Carl specifically denied ever receiving a letter dated February 4, 1999, purporting to discipline him (see G.C. Exh. 5) for the December 19 incident. However, another employee, Michael Morrison, Wallace's boyfriend and then a dispatcher and EMT, was disciplined—discharged—for his part in this incident in mid-January 1999.

[47] Morrison was called by the Respondent and testified at the hearing. Morrison, a former employee, was given a verbal and later a written reprimand in early January 1999 for interference with another detail because of his involvement with December 19 incident. He was told at the time that any discipline would be administered after the holidays because Sakel did not like to impose a discipline at the holiday time. Morrison's written notice informed him that he would be terminated within 30 days. His last day at the Company was around mid-January. Morrison was a supervisor with the Respondent—lead dispatcher—during the Union's first organizing campaign. At the time of Wallace's discharge, he was no longer dispatching but was an EMT driver. He claimed to have been demoted for complaints about the Company's policies and saying that he would like to see a union come in. However, while Morrison was familiar with the Union, he was not involved in any organizing activities nor was he aware of any union activities before or after the December 19 incident.

readily concedes that Wallace was not involved in the union organizing activities, did not sign an authorization card, and, in fact, was not even aware of the union campaign until she returned to work from a surgery on about February 13, 1999. The General Counsel acknowledges that, at most, Wallace supported the Union and only discussed it with other nonmanagement employees. The General Counsel argues that the Respondent, however, believed she was a strong union supporter. In support of her position, the General Counsel points to the testimony of Nunn who testified that around February 23 Shepherd volunteered in a conversation about the union campaign that Michael Morrison was heading up the campaign and that Wallace, then dating Morrison, was going to head up the Union.[48] The General Counsel further submits that the Respondent's animus toward the Union was clearly evident by statements Shepherd made to employees on February 23 and 24. Additionally, Neff's physical threats and his informing employees that they would have to pay for vehicular damages were clearly hostile and connected to the Union's possibly winning the election. Moreover, the General Counsel argues that the timing of the disciplinary action, February 6, approximately 3 days after the Respondent's receipt of the Union's election petition, suggests an unlawful motive underlying the discipline of Wallace.

The Respondent contends, in essence, that Wallace was suspended, although belatedly, because she knowingly violated company policy. Moreover, Wallace was told of the Respondent's decision by telephone on the day of the violation and in a subsequent meeting about a week later. The actual suspension was not implemented because of Sakel's concern for his employees during the holiday season. The Respondent admits that the entire month of January passed by with no action by management on the matter but that this was due to a misunderstanding by Sakel and Supervisor Crank regarding who was to follow through on Wallace's discipline. The Respondent asserts that delivery of the notice to her was delayed until February 25 because of Wallace's being on sick leave, Crank's difficulty in reaching her, and the press of other business;[49] the Respondent also suggests that delivery was delayed possibly because Wallace was trying to evade management's' attempt to give her written discipline.[50] The Respondent submits that the decision to suspend Wallace was made prior to its actual awareness of the Union's organizing efforts. Wallace herself admitted she engaged in no activities supportive of the Union and, at the time she received notice of her suspension, the Respondent knew nothing of her support of the Union. In short, the Respondent contends that Wallace was not suspended because of union involvement, support, or activities first because she was not involved with the Union and its activities, at least as far as the Respondent was aware. Rather, her suspension was solely based on her violation of company policy.

Legal Analysis and Conclusion of the 8(a)(3) Allegations

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization 29 U.S.C. §158(a)(3).

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) or Section 8(a)(1) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected activity(ies) of the employees was a motivating factor in the employer's decision to discipline or discharge her. If this is established, the burden then shifts to the employer to demonstrate that discipline or discharge would have occurred irrespective of whether the employee was engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances proved. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co*., 303 NLRB 638, (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co*., 303 NLRB 1039, 1044 (1991); and *In-Terminal Service Co*., 309 NLRB 23 (1992).

Once the General Counsel has made a prima facie case, the burden shifts back to the employer. That burden requires a respondent "to establish its *Wright Line* defense only by a pre-

[48] Wallace confirmed that on about February 24, Nunn relayed Shepherd's conversation to her. The General Counsel also notes Lewis' conversation with Shepherd in which Shepherd said that he had heard through the grapevine that if the Union were voted in, Wallace would be the union representative. (Tr. 19.)

[49] Crank testified at the hearing that he investigated the Wallace incident but was under the impression that Sakel had already handled Wallace's discipline when he was approached by Sakel regarding the status of Wallace's case on February 4. Crank prepared Wallace's formal discipline on February 9 because he was out of the office on February 5; February 6 and 7 fell on the weekend; and he was out of the office on February 8. Wallace was on sick leave from February 9 through the 12 and returned to work on February 13. Crank, because of his duties and schedule, found it difficult to catch Wallace, and ultimately ALS Supervisor Garrison was told to give her the notice. Crank believed that Garrison gave Wallace the notice on February 29. (Note: February had only 28 days in the 1999 calendar year.)

[50] Laurie Waldron, an EMT at the Afton station, testified that she worked with Wallace from November 1998 through May 1999 and that some time during the first of the year, Garrison and Shepherd were looking for Wallace at the station and Wallace, contrary to her normal routine, and procedure left the station by way of the side door. Waldron was not sure of the date in 1999 or whether Wallace had not been dispatched or otherwise notified that management was looking for her. Shepherd testified that he and Garrison tried to give Wallace the notice on February 23. Shepherd said that Wallace did not know she was wanted and he did not page her or otherwise try to notify her that day. I am not inclined to believe that Wallace at any time attempted to evade receipt of her disciplinary notice.

ponderance of evidence." The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

Regarding the General Counsel's case, it is clear that Wallace engaged in no activities supportive of the Union either before or during the critical period. So, to the extent that the charge can be made out, it must rest on the allegation that the Respondent believed she was a union organizer and that its discipline of her during the critical period was motivated by that belief. This is a hard proposition to accept under the totality of the circumstances in this case. First, it is clear that Wallace knowingly engaged in conduct which she knew possibly violated the Respondent's crew exchange policy and its basic purpose or objective—avoiding delay and interruption of transport service of patients. That there was no patient aboard the ambulance and the medical team voiced no opposition to the exchange does not alter the fact that the child to be transported was delayed somewhat by the exchange. Before the exchange, there well may have been some confusion about whether the exchange was approved, but Wallace was clearly on notice before the actual exchange that there was a question. She was told not to effect the exchange and told that disciplinary action could ensue. In point of fact, the Respondent acted expeditiously and immediately regarding the violation and informed Wallace that she would be disciplined by a suspension that was similar to that received by other employees who had violated the transfer policy.[51] Consistent with management (Sakel's) policy, Wallace's discipline merely was postponed until after the holidays. In my view, this was in keeping with traditional sentiments associated with Christmas and, as a consequence, it is possible that her discipline, through inadvertence, could have fallen through the cracks during this celebratory time of the year. Plausible also is the possible miscommunication between those responsible for administering the discipline and delivery of the notice to Wallace.[52] Notably, Wallace herself did not actually pursue the status of her discipline (she probably, like most people, hoped it would be forgotten) and she was on sick leave for a period. Thus, while the timing of the delivery of the discipline seems to be unwise[53] an inference of animus and improper motivation is not warranted. Certainly, the record is clear that the Respondent did not want the Union, having previously resisted it, and as evidenced by Sakel's employee meetings, the Respondent felt that the Company could adequately look out for the employees without the Union. However, I do not believe that Wallace's discipline had any connection with the Respondent's resistance to the Union's organizing efforts.

The General Counsel's position rests primarily on Shepherd's queries of employees regarding Wallace's possibly being a union leader. While Shepherd seemingly had no qualms about talking to the employees about the Union and, contrary to the instructions of his management during the critical period, in all likelihood communicated his opinions to management, he had no hand in the decision to discipline Wallace and apparently was simply enlisted by management to give her the written discipline because he was the onsite supervisor at Wallace's duty station.[54] Thus, in my view, on balance, Shepherd's erroneous belief that Wallace was a union ringleader was based on his equally erroneous belief that Wallace's boyfriend supported the Union. Thus, reduced to its core, the General Counsel's argument is predicated on one erroneous "belief" piled on another. The record evidence shows Wallace was not, and nor was her boyfriend, ever involved in the Union's campaign.

The record also shows that the decision to discipline Wallace antedated the union campaign by over a month, and the reason for her discipline is based on and justified by a sound business policy. Thus, based on *Wright Line*, the General Counsel did not establish, prima facie, that Wallace's discipline was motivated by her perceived union activities or involvement, and I would recommend dismissal of this aspect of the complaint.[55]

### *E. The Alleged Interrogation of Employees by Neff*

The General Counsel requests that Respondent be found in violation of Section 8(a)(1) based on testimony of one of the Respondent's witness. The General Counsel contends that this witness implicated Neff in an unlawful interrogation of employees during the union campaign in the course of my examination of him at the hearing.

The record reflects the following exchange between witness Paul Mascavage and me (at Tr. 296):

> BY JUDGE SHAMWELL:
>
> Q. Let me just get in, there's just one question I want to know. You say you know Mr. Neff.
>
> A. Uh—huh,
>
> Q. Pretty well, and you . . . and you've dealt with him, so you know something of his personality and his way.
>
> A. Yes, I do.
>
> Q. Now, during this campaign, did you ever hear him speak about the Union?
>
> A. The . . . he would ask how we felt about the Union, if we were for or against.
>
> Q. He asked you if you were for or against the Union? And did he express any of his own opinions to you all regarding the Union?
>
> A. His opinion would waiver depending if you were for [or] against. If you were for it, he would say he was for it. If you were against it, he would say he was against it.
>
> Q. So he sort of went both ways of the street?
>
> A. He went both ways. He . . . he didn't want to have any conflict with anybody.
>
> Q. I assume there [were] other mechanics, if he was the head.
>
> A. There . . . there were other mechanics, and he was . . . he was the head mechanic.
>
> Q. And he would . . . in any discussions about the Union, your testimony, he would ask whether you were for or

[51] See R. Exh. 2, the suspension of Steve Popp on May 31, 1998.

[52] It does seem somewhat odd to me that the Respondent's manager had such difficulty in getting the notice to Wallace; she was always within radio contact or pager, and yet no one simply paged her in order to give her notice.

[53] I am once again mindful that the Respondent conducted training for its management regarding the "do's" and don'ts" in the context of a union campaign and election.

[54] I have credited Crank's testimony regarding his handling of Wallace's discipline and his attempts to get the notice in her hands.

[55] If I had found, arguendo, that the General Counsel had made out a prima facie case, I, nonetheless, am persuaded that the Respondent would have imposed the suspension for violation of the crew exchange policy on Wallace in spite of its belief that she was a union supporter and/or engaged in activities on behalf of the Union under *Wright Line* supra.

against, and depending on the response of the person addressed, he would . . . he would make his own response pretty much in agreement with them, I guess.

A. Uh—huh.

The General Counsel submits that although not alleged in the complaint these statements are actionable and pose a violation of the Act. She further argues for a finding of a violation as the matter was fully litigated in the hearing.

As noted earlier here, the basic test for violations of Section 8(a)(1) is whether the complained of conduct, here the statements by the Respondent's maintenance supervisor, reasonably tended to interfere or coerce. Instrumental to the application of the test is the analysis of the context of the statements, the totality of the circumstances, as it were. The General Counsel submits that this matter should be adjudicated, contending that it was fully litigated. As to the statements, Mascavage claimed that Neff asked various employees about their views on the Union. However, Mascavage was not asked by me or by the General Counsel about the particulars surrounding the statement. Therefore, though Neff may have queried employees[56] and such queries could be unlawful, we know nothing of the circumstances under which he allegedly made them. In other words, we know what Neff may have said but the where, when, why, and whom questions remain unanswered. Therefore, in my view, it can hardly be said that this matter was fully litigated.

Also, there is the matter of what I consider fundamental fairness. Although Mascavage testified under my examination, the General Counsel and the Charging Party did not, at the hearing or at its conclusion, request an amendment to the charges. Thus, to me, the Respondent was not fairly alerted to the possibility that these somewhat nebulous comments would be the subject of additional charges.[57] Accordingly, I decline to find a violation.

The Objections

Having found support in the record for certain of the objections to conduct affecting the results of the election filed by the Union (Petitioner) in Case 9–RC–17204, namely, Objections 5, 6, 7, and 8, and having also concluded that such conduct violates Section 8(a)(1) of the Act, I conclude that the Company has interfered with the exercise of employee free choice in the election conducted on March 12, 1999. Accordingly, I recommend that election be set aside and a second election be directed.

CONCLUSIONS OF LAW

1. Medic One, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of EMTs and Paramedics, NAGE–SEIU, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Medic One violated Section 8(a)(1) of the Act by threatening employees with loss of wages and benefits if they selected the Union as their collective-bargaining representative; informing employees that regularly scheduled wage increases would be postponed until after the union campaign and election; threatening employees with physical harm if the Union were selected as their collective-bargaining representative; and informing employees they would be required to pay for damages to its vehicles arising out of accidents.

4. Medic One did not violate the Act in any other way.

5. By certain of the unfair practices found here, Medic One has interfered with the freedom of choice of its employees and I recommend that the election held on March 12, 1999, in Case 9–RC–17204 be set aside and that a second election be directed.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I further recommend the Respondent be ordered to post an appropriate notice to employees attached as "Appendix" for a period of 60 days in order that employees may be apprised of their rights under the Act and its obligation to remedy the unfair labor practices. I recommend the notice to employees be posted in both English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[58]

ORDER

The Respondent, Medic One, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with loss of wages and benefits if they select the Union as their collective-bargaining representative.

(b) Informing its employees that regularly scheduled wage increases would be postponed until after the union campaign and election.

(c) Threatening its employees with physical harm if the Union were selected as the employees' collective-bargaining representative.

(d) Informing its employees that if the Union were selected as their collective-bargaining representative, employees would be required to pay for damages arising out of accidents involving company vehicles.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Cincinnati, Ohio area facilities and stations copies of the attached notice marked "Appendix."[59] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in consecutive days in conspicuous places, including all places where

[56] I am not persuaded to credit Mascavage's testimony that Neff indeed made these statements.

[57] The Respondent's counsel did not address this point in his brief, confirming my belief that his client would be unfairly penalized by my finding a violation based on this paltry record.

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[59] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the results of the election held on March 12, 1999, in Case 9–RC–17204 be set aside and that the representation matter be remanded to the Regional Director for Region 9 for the purpose of conducting a new election, at such time as he deems the circumstances permit the free choice of a bargaining representative.